Impian Selama Communication and Services Sdn Bhd v K Ravindrasilan a/l Krishnasamy & Anor

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO BA-24NCvC-771–06 OF 2021
ROZI BAINON JC
7 MAY 2022

Civil Procedure — Discovery — Application for — Plaintiff applied for discovery of documents against defendants — Whether documents sought were related to matter in question

This was the plaintiff's application via encl 1 for discovery of documents against the defendants ('D1' and 'D2'). D1 opposed the application by stating the facts in issues as follows: (a) the plaintiff filed the originating summons pursuant to O 24 r 7A of the Rules of Court 2012 based on the shareholders agreement between the plaintiff and several parties including ZPR Synergy Sdn Bhd. D1 was one of the directors of ZPR Synergy Sdn Bhd; (b) the plaintiff filed the application for discovery against D1 pursuant to cl 11 of the shareholders agreement stating that there were restrictions on business competition which existed between the plaintiff and D1; (c) D1 averred that although the shareholders agreement was signed between the plaintiff and ZPR Synergy Sdn Bhd, the plaintiff had no merit in filing the application against D1 and it should be dismissed; and (d) the plaintiff was on 'fishing expedition'. The plaintiff averred that the plaintiff had satisfied all the requirements and thus asked for order in terms against the defendants.

Held, allowing the application:

(1) The documents sought were relevant and important to the plaintiff who need to 'build up' the case against D1, D2 and any third party. The facts in issues as raised by D1 could only be decided after a statement of claim, defence, reply to defence and if there was a counterclaim. The action brought by the plaintiff against the defendants was for the loss suffered by the plaintiff and including the plaintiff's reputation. The documents sought in the application were material to the plaintiff's case. The particular documents ought to be produced by the D1 and/or D2 and the plaintiff was allowed to discover those documents on the reasons that the particular documents were relevant documents and need to be used (see paras 13–15 & 17).

[Bahasa Malaysia summary

Ini adalah permohonan plaintif melalui lampiran 1 untuk penzahiran dokumen terhadap defendan ('D1' dan 'D2'). D1 menentang permohonan itu dengan menyatakan fakta dalam isu seperti berikut: (a) plaintif memfailkan saman pemula menurut A 24 k 7A Kaedah-Kaedah Mahkamah 2012 berdasarkan perjanjian pemegang saham antara plaintif dan beberapa pihak termasuk ZPR Synergy Sdn Bhd. D1 ialah salah seorang pengarah ZPR Synergy Sdn Bhd; (b) plaintif memfailkan permohonan untuk penzahiran terhadap D1 menurut klausa 11 perjanjian pemegang saham yang menyatakan bahawa terdapat sekatan ke atas persaingan perniagaan yang wujud antara plaintif dan D1; (c) D1 menegaskan bahawa walaupun perjanjian pemegang saham telah ditandatangani antara plaintif dan ZPR Synergy Sdn Bhd, plaintif tidak mempunyai merit dalam memfailkan permohonan terhadap D1 dan ia harus ditolak; dan (d) plaintif sedang dalam 'ekspedisi memancing'. Plaintif menegaskan bahawa plaintif telah memenuhi semua keperluan dan dengan itu memohon perintah dari segi terma terhadap defendan.

Diputuskan, membenarkan permohonan:

(1) Dokumen yang dipohon adalah relevan dan penting kepada plaintif yang perlu 'membina' kes terhadap D1, D2 dan mana-mana pihak ketiga. Fakta dalam isu seperti yang dibangkitkan oleh D1 hanya boleh diputuskan selepas pernyataan tuntutan, pembelaan, jawapan kepada pembelaan dan jika ada tuntutan balas. Tindakan yang dibawa oleh plaintif terhadap defendan adalah untuk kerugian yang dialami oleh plaintif dan termasuk reputasi plaintif. Dokumen yang dipohon dalam permohonan adalah material kepada kes plaintif. Dokumen tertentu sepatutnya dikemukakan oleh D1 dan/atau D2 dan plaintif dibenarkan untuk dizahirkan dokumen tersebut atas sebab dokumen tertentu adalah dokumen yang berkaitan dan perlu digunakan (lihat perenggan 13–15 & 17).]

Cases referred to

Allianz General Insurance Company (M) Bhd v Chubb Insurance Malaysia Bhd (formerly known as Ace Jerneh Insurance Bhd) [2018] MLJU 759; [2018] 1 LNS 825, HC (refd)

Billion Prima Sdn Bhd & Anor v Nutech Co Ltd & Anor [2017] 10 MLJ 213, HC (refd)

Official Receiver and Provisional Liquidator Maril-Rionebel (M) Sdn Bhd (formerly known as Kredin Sdn Bhd) v Anafartal Caddesi Sdn Bhd [2006] 4 MLJ 1, HC (refd)

Legislation referred to

Companies Act 2016 s 20(a)

Rules of Court 2012 O 24 rr 3, 4, 7, 7A, 8, 11

R Kengadharan (R Kengadharan & Co) for the plaintiff.
Harjit Singh (Harjit & Assoc) for the first defendant.

Rozi Bainon JC:

INTRODUCTION

[1] Enclosure 1 is the originating summon of the plaintiff's application for the following orders:

(a) perintah bahawa Defendan Pertama (D1) dan Defendan Kedua (D2) dalam tempoh 30 hari dari tarikh ini atau jangka masa tersebut yang ditetapkan oleh Mahkamah ini, diwajibkan mengemukakan salinan dokumen yang berikut, yang berada dalam milikan, jagaan, kawalan atau bidang kuasa D1 dan D2 di hadapan Mahkamah ini —

(i) penyata akaun Terra Wave Sdn Bhd yang diaudit untuk tempoh berakhir pada tahun 1-1-2017 hingga 31-12-2017 dan 1-8-2018 hingga 31-12-2018 bersama dengan dokumen sokongan.

(ii) pesanan pembelian (purchase orders) yang diisukan oleh pelanggan bagi kesemua kerja yang dilakukan dalam tempoh 1-1-2017 sehingga ke tarikh tamat kontrak berkaitan dengan Projek DOHA.

(iii) salinan tempahan tiket penerbangan dan dokumen perjalanan (VIS) pekerja-pekerja yang telah dihantar ke DOHA serta inbois perbelanjaan penginapan, penggajian dan kos mendapatkan dokumen perjalanan.

(iv) butir-butir serta kesemua dokumen pembayaran yang telah diterima oleh D1 dan D2 berkaitan dengan Projek DOHA.

(v) salinan penyata bank D2 dari 1-8-2017 sehingga tarikh tamat Projek DOHA.

(vi) salinan penyata bank D1 dari 1-7-2017 sehingga tarikh tamat Projek DOHA.

(b) perintah bahawa D1 dan D2 secara bersama dan/atau individu memfailkan afidavit di Mahkamah menyenaraikan dan mengekshibitkan setiap dokumen tersebut di atas dalam masa 14 hari dari tarikh perintah ini.

(c) kos dibayar atas dasar peguam cara dan klien.

(d) sebarang perintah dan/atau relief lain yang dianggap adil dan sesuai untuk diputuskan oleh Mahkamah ini.

[2] The reasons to support the application are, namely:

(a) Plaintif telah kehilangan kontrak serta pelanggan yang baik.

(b) D1 dan D2 telah merampas kontrak kepunyaan Plaintif perbuatan yang mana telah menjejaskan integriti Plaintif secara umum serta nama baik Plaintif di kalangan industry tempatan dan luar negara.

(c) muslihat D1 dan/atau D2 tidak mencerminkan kejujuran dan keikhlasan sewaktu berkhidmat dengan Plaintif.

[3] Enclosure 1 is supported with an affidavit filed by the plaintiff.

THE PLAINTIFF'S AFFIDAVIT IN SUPPORT

[4] The plaintiff has stated that the he had fulfilled all the requirements under the law and procedure in order for this court to grant the orders.

[5] The affidavit in support affirmed by the plaintiff's director stated the following:

(a) D1 telah berkhidmat dengan Plaintif sejak tahun 2013 hingga 2017.

(b) sewaktu berkhidmat dengan Plaintif, D1 telah melanggar klausa 11 Shareholders Agreement bertarikh 25-3-2016.

(c) tanpa pengetahuan Plaintif, D1 telah menempah kontrak di DOHA dengan menggunakan perkhidmatan, kemampuan dan kebolehan Plaintif.

(d) Plaintif menyenaraikan aliran e-mel mengenai pernyataannya mengenai tindakan salah laku D1.

(e) tindakan D1 dan D2 itu telah mengaut keuntungan di luar negara.

(f) Plaintif menegaskan berdasarkan aliran e-mel tersebut jelas bahawa kontrak yang berkenaan sebenarnya dipohon dengan menggunakan butiran dan profil Plaintif. Plaintif ialah sebuah syarikat yang mempunyai kebolehan, kemampuan dan pengalaman di luar negara khususnya di nagara Chile pada tahun 2016 hingga 2017 di mana D1 adalah individu yang terlibat secara langsung dan D2 mempunyai pengetahuan terperinci.

(g) D1 dan D2 tidak mendedahkan apa-apa butiran mahupun maklumat mengenai tempahan dan kontrak tersebut kepada Plaintif. D1 menandatangani kontrak tersebut secara senyap dengan mengguna pakai nama Plaintif.

(h) Plaintif menegaskan bahawa D1 dan D2 dan termasuk pihak ketiga yang besar kemungkinan dikenali oleh Plaintif telah bersubahat secara bersama untuk merampas ('hijacked') kontrak kepada Plaintif.

(i) tindakan D1 dan D2 dan termasuk pihak ketiga telah merugikan Plaintif dan menjejaskan integriti Plaintif secara umum dan nama baik Plaintif secara khusus di dalam industri tempatan serta luar negara.

(j) Plaintif menegaskan bahawa Plaintif telah kehilangan kontrak serta pelanggan yang baik yang telah menyokong Plaintif sejak tahun 2015 yang dikenali sebagai Thales Malaysia Sdn Bhd.

(k) Oleh yang demikian, permohonan penzahiran dokumen ini amat penting kepada Plaintif bagi tujuan Plaintif memulakan tindakan undang-undang secara formal ke atas pihak-pihak yang berkaitan

ESSENCE OF CONTENTIONS BY THE PARTIES

[6] It is a key submission of the D1 that the D1 opposes encl 1 by stating the facts in issues as follows:

(a) plaintiff filed the originating summons pursuant to O 24 r 7A of the Rules of Court 2012 based on the shareholders agreement dated 25 March 2016 between the plaintiff and several parties including ZPR Synergy Sdn Bhd. D1 is one of the directors of ZPR Synergy Sdn Bhd;

(b) plaintiff filed application for discovery against the D1 pursuant to cl 11 of the shareholders agreement stating that there are restrictions on business competition which exist between the plaintiff and D1;

(c) D1 averred that although the shareholders agreement was signed between the plaintiff and ZPR Synergy Sdn Bhd, the plaintiff had no merit in filing this application vide the OS against the D1 and it should be dismissed based on these grounds:

(i) D1 is neither a party nor privy to the shareholders agreement:
The plaintiff brought this action against the wrong party. The plaintiff entered into the shareholders agreement with ZPR Synergy Sdn Bhd and not with D1. D1 had signed the shareholders agreement in his capacity as a Director of ZPR Synergy Sdn Bhd and not in his individual capacity. Therefore, D1 is neither a party nor privy to the shareholders agreement;

(ii) separate legal entity:
ZPR Synergy Sdn Bhd is a separate legal entity from D1 who is only one of the Director's in ZPR Synergy Sdn Bhd. Section 20(a) of the Companies Act 2016 clearly states that a company is a separate legal entity than its members.
In the present case, D1 is only one of the Director's in ZPR Synergy Sdn Bhd.
D1 was also neither an employee of the plaintiff nor was he personally/contractually engaged to provide services to the plaintiff. There is also no evidence such as a letter of appointment or contract of employment which exists between the plaintiff and D1.
As such referring to s 20(a) of the Companies Acts 2016 and the case of *Official Receiver and Provisional Liquidator Maril-Rionebel (M) Sdn*

Bhd (formerly known as Kredin Sdn Bhd) v Anafartal Caddesi Sdn Bhd [2006] 4 MLJ 1, the issue of restrictions on business competition between the plaintiff and D1 do not exist;

(iii) the shareholders agreement is void ab initio:

D1 averred that before the plaintiff relies on cl 11 of the shareholders agreement to file this application, the plaintiff has to prove the validity and/or legitimacy of the shareholders agreement.

The parties to the shareholders agreement failed to fulfill the main conditions stated in the shareholders agreement which is cl 5 of the shareholders agreement.

The defendant submits that cl 5 of the shareholders agreement was not complied with, therefore rendering the entire agreement *void ab initio* (void from the beginning) and the plaintiff is therefore estopped from relying on cl 11 in this proceeding or any other future suits against any individual or company.

As such, the plaintiff is barred from relying on the cl 11 of the shareholders agreement to file this application in court due to restoration principle as the parties ought to be restored to their original position as prior to the shareholders agreement;

(iv) shareholders agreement is a sham agreement:

D1 averred that the shareholders agreement was indeed a sham agreement created by the plaintiff which is entirely for its own benefit. ZPR Synergy Sdn Bhd did not receive any profits or ownership of the shares in accordance to the Companies Act 2016 from the plaintiff wherein ZPR Synergy Sdn Bhd believed that they have equity ownership in plaintiff. The plaintiffs intentions were expressly stated in cl 15.7 — General of the shareholders agreement which states as follows:

> 15.7 Nothing in this Agreement shall be deemed to constitute a partnership between the parties (or any of them) nor constitute any party or parties the agent of the other party *or parties or* otherwise entitle any party to have *authority to bind* any *other* party *for any purpose.*

Clause 15.7 in itself defeats the purpose of the shareholders agreement. As such, the plaintiff should not be allowed to benefit from it at its whims and fancies. It is a sham agreement to begin with as cl 15.7 is 'blowing hot and cold' at the same time.

(d) the plaintiff is on 'Fishing Expedition':

O 24 r 7A of the Rules of Court 2012 permits the discovery of documents relevant to an issue which is likely to arise out of the claim made or likely to be made in the proceedings, However, the plaintiff has the legal burden to fulfil the 'Relevancy Requirement'. This principle

was also stated in *Billion Prima Sdn Bhd & Anor v Nutech Co Ltd & Anor* [2017] 10 MLJ 213 at paras 4, 5 and 6 of the judgment which are as follows:

> (4) Order 24 r 3(1) of the previous Rules of High Court 1980 ('the RHC') provides that in pending actions, the court may order the discovery of documents 'relating to any matter in question in the cause or matter'. Once again, I am of the view that the relevancy requirement is less stringent than that provided in O 24 r 3(1) RHC because O 24 r 7A RC permits discovery of Documents relevant to an issue which is 'likely *to arise out of the claim made or likely to be made in the proceedings'*. In other words, the relevancy requirement is satisfied when the supporting affidavit shows that the documents are relevant to any issue which may be 'likely' to arise in the pending suit. Such a view is fortified by a purposive construction of O 24 r 7A of the RC.
>
> Here, the plaintiff failed to proof the relevancy requirement. The plaintiff should proof to the court in the supporting affidavit the followings prior to any order being issued under O 24 r 7A:
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> (i) the existence of the Project DOHA;
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> (ii) Project DOHA belongs to which company?
>
> (iii) Project DOHA was indeed meant to be awarded to plaintiff;
>
> (iv) whether Project DOHA was that D1 was indeed awarded to plaintiff in his capacity as an individual; and
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> (v) that D1 is likely to have or had the documents stated in the Originating Summon in his possession, custody or power.
>
> The plaintiff failed to prove all of the above and thus failed to proof the 'Relevancy Requirement' wherein this is indeed a fishing expedition that the plaintiff is on.
>
> The logical and practical question that this court ought to ask is *would an international company award an international project to the D1 who is an individual? Obviously the answer is 'No'.*
>
> As such it is illogical and impossible for the D1 to have any of the documents stated in the originating summon in his possession, custody or power.

[7] The plaintiff averred that the plaintiff had satisfied alI requirements and thus ask for order in terms against D1 and D2 on the following reasons:

(a) firstly, in the plaintiff's affidavit in support, the plaintiff had specified or described the documents in respect of which the order is sought;

(b) secondly, the plaintiff's affidavit in support had showed, if practicable by reference to any pleading served that the documents are relevant to an

issue arising or likely to arise out of the claim made. In particular, the plaintiff had demonstrated the relevancy of the documents.

(c) thirdly, the plaintiff's affidavit in support had showed that D1 and D2 is likely to have or have had the documents as listed in his possession, custody or power;

(d) fourthly, the plaintiff bears the legal onus to satisfy the court that a discovery application against third party is necessary, either:

(i) to fairly dispose of the pending suit; or;

(ii) to save costs.

(e) fifthly, the documents are not privileged;

(f) sixthly, the discovery application against third party and supporting affidavit must be served:

(i) personally, on the third party; and

(ii) on every party in the pending suit.

[8] Further, the plaintiff must show:

(a) bona fide cause of action against the defendants;

(b) the required documents are in the possession, custody or control of the defendants; and

(c) the documents sought are necessary for the plaintiff to institute proceedings against the defendants.

THE LAW

[9] The provision for discovery of documents under the O 24 rr 3, 4, 7, 8 and 11 of the Rules of Court 2012 as rely upon by the plaintiff in its application are as follows:

Order 24 Discovery and inspection of documents

Order for discovery (O 24, r 3)

3(1) Subject to the provisions of this rule and of rules 4 and 8, the Court may at any time order any party to a cause or matter (whether begun by writ, originating summons or otherwise) to give discovery by making and serving on any other party a list of the documents which are or have been in his possession, custody or power and may at the same time or subsequently also order him to make and file an affidavit verifying such a list and to serve a copy thereof on the other party.

(2) (There is no paragraph (2))

(3) (There is no paragraph (3))

(4) The documents which a party to a cause or matter may be ordered to discover under paragraph (1) are as follows:

(a) the documents on which the party relies or will rely; and

(b) the documents which could —

(i) adversely affect his own case;

(ii) adversely affect another party's case; or

(iii) support another party's case.

Order for determination of issues before discovery (O 24, r 4)

4. Where on an application for an order under rule 3, it appears to the Court that any issue or question in the cause or matter should be determined before any discovery of documents is made by the parties, the Court may order for that issue or question to be determined first and give such other directions as may be necessary.

Order for discovery of particular documents (O 24, r 7)

7(1) Subject to rule 8, the Court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class of document so specified or described is, or has at any time been, in his possession, custody or power, and if not then in his possession, custody or power when he parted with it and what has become of it.

(2) An order may be made against a party under this rule notwithstanding that he may already have made or been required to make a list of documents or affidavit under rule 3.

(3) An application for an order under this rule shall be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under this rule has, or at some time had, in his possession, custody or power the document, or class of document, specified or described in the application, and that it falls within one of the following descriptions:

(a) a document on which the party relies or will rely;

(b) a document which could —

(i) adversely affect his own case;

(ii) adversely affect another party's case; or

(iii) support another party's case; and

(c) a document which may lead the party seeking discovery of it to a series of inquiry resulting in his obtaining information which may —

(i) adversely affect his own case;

(ii) adversely affect another party's case; or

(iii) support another party's case.

(4) An order under this rule shall not be made in any cause or matter in respect of any party before an order under rule 3 has first been obtained in respect of that party, unless, in the opinion of the Court, the order is necessary or desirable.

Discovery to be ordered only if necessary (O 24, r 8)

8. On the hearing of an application for an order under rule 3, 7 or 7a, the Court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or adjourn the application and shall in any case refuse to make such an order if and so far as it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs.

Order for production for inspection (O 24, r 11)

11 (1) If a party who is required by rule 9 to serve such a notice as is therein mentioned or who is served with a notice under rule 10(1) —

(a) fails to serve a notice under rule 9 or, as the case may be, rule 10(2);

(b) objects to produce any document for inspection; or

(c) offers to inspect at a time or place such that, in the opinion of the Court, it is unreasonable to offer inspection then or, as the case may be, there,

then, subject to rule 13(1), the Court may, on the application of the party entitled to inspect, make an order in Form 43 for production of the documents in question for inspection at such time and place, and in such manner, as it thinks fit.

(2) Without prejudice to paragraph (1) but subject to rule 13(1), the Court may, on the application of any party to a cause or matter, order any other party to permit the party applying to inspect any documents in the possession, custody or power of that other party relating to any matter in question in the cause or matter.

(3) An application for an order under paragraph (2) shall be supported by an affidavit specifying or describing the documents of which inspection is sought and stating the belief of the deponent that they are in the possession, custody or power of the other party and they relate to a matter in question in the cause or matter.

EVALUATION AND FINDINGS OF THIS COURT

[10] The Legislature has given the court discretion in allowing or disallowing an application for discovery and inspection of the documents. The words 'may' and 'in the opinion of the court' give this court power to decide whether the documents sought by the defendant are related to the matter in question in the cause or matter.

[11] In the affidavit in support filed by the plaintiff, there is a list and the plaintiff has named what are the particular documents needed by him for the institution of a legal suit against D1 and D2.

[12] The affidavit by the plaintiff that specifying or describing the

documents of which discovery is sought and stating the belief of the plaintiff that they are in the possession, custody or power of the other party and they relate to a matter in question in the cause or matter.

[13] After analysing the application by the plaintiff, this court had satisfied that the documents sought are relevant and important to the plaintiff who need to 'build up' the case against D1, D2 and any third party.

[14] The facts in issues as raised by D1 only can be decided after a statement of claim, defence, reply to defence and if there is a counterclaim. This case must be disposed of fairly against all the parties.

[15] The action brought by the plaintiff against the defendants is for the loss suffered by the plaintiff and including the plaintiff's reputation. The documents sought in this application are material to the plaintiff's case.

[16] The D1 and D2 have the opportunity to file in the defence and protect their rights based on the shareholders agreement, emails, etc.

[17] The particular documents ought to be produced by the D1 and/or D2 and the plaintiff is allowed to discover those documents on the reasons that the particular documents are relevant documents and need to be used. The defendants also have the chance to file the affidavit by listing out the documents that are in their possessions, control and power.

[18] In the case of *Allianz General Insurance Company (M) Bhd v Chubb Insurance Malaysia Bhd (formerly known as Ace Jerneh Insurance Bhd)* [2018] MLJU 759; [2018] 1 LNS 825, Yang Arif Mohamed Zaini Mazlan, High Court judge, Kuala Lumpur has quoted clearly the law on discovery as follows:

> The law on discovery
>
> [12] The leading authority is the case of *Yekambaran s/o Marimuthu v Malayawata Steel Bhd* [1993] MLJU 96; [1994] 2 CLJ 581 (HC). Edgar Joseph J (as His Lordship then was), held that an applicant must satisfy the following three elements before being entitled to an order for discovery:
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> (a) there must be a document;
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> (b) the document must be relevant; and
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> (c) the documents must have been in the possession, custody or power of the party that the discovery is sought from.
>
> [13] It is pertinent for an applicant to prove that the documents sought are most relevant to its case. The applicant's case must be based on its pleading; *Tan Chin Seng v Raffles Town Club* [2002] 2 SLR(R) 465.

[14] In order for the documents to be relevant, the applicant must be able to demonstrate that the documents sought would advance its case or damage its adversary's case. The following passage in the Singapore High Court's case of *Manilal & Sons (Pte) Ltd v Bhupendra KJ Shan (t/a JB International)* [1990] 2 MLJ 282, is pertinent:

> Under a general order of court for discovery, a party is obliged to make discovery of all documents relevant to the matters in question in the action. What are the matters in question would depend on the pleadings. A document relates to the matter in question in the action if it contains information which may — not which must — either directly or indirectly enable the party requiring the discovery either to advance his own case or to damage the case of his adversary or which may fairly lead to a train of inquiry which may have either of those two consequences: see *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* [1882] 11 QBD 55 at p 62.

CONCLUSION

[19] In view of the foregoing, it is my judgment that having evaluated the evidence adduced at the trial, I find that the application made by the plaintiff is justified and discovery of the particular documents are for the plaintiff to formally file the legal suit against the defendants or any third party.

[20] On 31 March 2022, I allowed the application for discovery and order in terms.

Application allowed.

Reported by Nabilah Syahida Abdullah Salleh